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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92048271
Party	Plaintiff Rhino Linings USA, Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Registration No. 1,698,407
Date of Issue: June 30, 1992

RHINO LININGS USA, INC., Petitioner,	)	
vs.	)	Cancellation No. 92048271
RAPID RACK INDUSTRIES, INC., Applicant.	)	

PETITIONER'S RESPONSE IN OPPOSITION TO MOTION FOR AN EXTENSION OF TIME

NOW COMES Petitioner Rhino Linings USA, Inc. ("Petitioner"), by and through the undersigned counsel, respectfully submits this Response in Opposition to the Motion for an Extension of Time (Doc. No. 13) filed by Registrant Rapid Rack Industries, Inc. ("Rapid Rack"). Rapid Rack's Motion is part of a strategy by Rapid Rack to obtain a "do-over" of the present litigation to avoid having to answer for—and having to live with—the consequences of its numerous discovery failures in this cancellation. Nearly a year into this cancellation, Rapid Rack still has not come forward with evidence on the ultimate issue of fact—namely, Rapid Rack's abandonment of the RHINO RACK Mark—in response to proper written discovery served by Petitioner. Consistent with the TBMP, the Board should not look the other way when its rules are violated. Rather, the Board should deny Rapid Rack's delay-oriented Motion, and should proceed to rule on Petitioner's Motion to Compel, Motion to Deem

Requests for Admissions Admitted, and Motion for Sanctions (the "First Motion for Sanctions") which has been pending before the Board since September 5, 2008.

STATEMENT OF PERTINENT FACTS

Petitioner filed the present cancellation proceeding on October 15, 2007. The Petition to Cancel alleges that Rapid Rack has abandoned the RHINO RACK Mark of Registration No. 1,698,407 and committed fraud on the Trademark Office in a declaration of use filed in 2002.

On November 12, 2008, Petitioner served a first set of Interrogatories, Requests for Admissions, and Requests for Production of Documents and Things. To this day, Rapid Rack still has not provided full and accurate responses as required by the Rules of Practice in Trademark Cases, the Trademark Board Manual of Procedure, and Federal Rules of Civil Procedure. After requesting numerous extensions of time and requesting two stipulated suspensions of the present cancellation, Rapid Rack finally served its putative responses to written discovery on June 24, 2008 (more than seven months after the requests were served).

On July 11, 2008, Petitioner's counsel sent a detailed letter requesting that Rapid Rack correct is numerous discovery violations. Since that time, Rapid Rack has refused to respond substantively to Petitioner's concerns or to supplement its responses. Petitioner was finally forced to file the First Motion for Sanctions on September 5, 2008. Petitioner also served a timely notice that it would take the Rule 30(b)(6) deposition of Rapid Rack on the last day of the discovery period set by the Board, September 22, 2008.

Rapid Rack has attempted to do everything imaginable to avoid responding to the Combined Motions. In accordance with Trademark Rule 2.127(a), Rapid Rack's response was due on or before September 25, 2008. Rather than preparing and filing a response to the Combined Motions, Rapid Rack spent the days just prior to its response deadline implementing

a scheme which it hoped would prevent the Board from acting on its refusals to provide discovery in this proceeding, as follows:

- On September 23, 2008, Rapid Rack filed a complaint in the Central District of California, parroting as a declaratory judgment claim the same issues that are already present in this cancellation. Essentially, Rapid Rack seeks a "do-over" of the present litigation, to avoid the consequences of its discovery violations, and to avoid the consequences of losing this cancellation action because Rapid Rack *has no evidence* of use in the relevant time period.
- On September 24, 2008, Rapid Rack filed a Motion to Suspend the present cancellation, premised solely on the do-over strategy that motivated Rapid Rack to file its September 23 complaint. Rapid Rack seeks delay by avoiding the present litigation—which has been *pending for a year* and is scheduled to end within the next six months—in the hopes of a new and lengthy lawsuit resulting from the filing of the California action.
- On September 25, 2008—the deadline for Rapid Rack to Respond to the Combined Motions—Rapid Rack instead filed a motion for extension of time to respond to the Combined Motions. In its filing, Rapid Rack did not even attempt to make the requisite showing of good cause. Instead, Rapid Rack again asserted that its eleventh-hour federal filing should constitute a "get out of jail free card" with respect to all proceedings before the Board.

It appears that Rapid Rack's eleventh-hour filings were also intended to impede Petitioner's ability to take the Rule 30(b)(6) deposition of Rapid Rack. When Petitioner's counsel ultimately insisted on proceeding with the deposition, Rapid Rack waited until after the

deposition had already commenced before informing Petitioner's counsel that it would not produce a designee for all of the topics in the 30(b)(6) deposition notice. This failure to appear and testify resulted in the filing of Petitioner's Second Motion for Sanctions.

LEGAL ARGUMENT

I. THERE IS NO GOOD CAUSE FOR THE EXTENSION SOUGHT BY RAPID RACK.

"[A] party moving to extend time must demonstrate that the requested extension of time is not necessitated by the party's own lack of diligence or unreasonable delay in taking the required action during the time previously allotted therefor." TBMP § 509.01(a). "The Board will "scrutinize carefully" any motion to extend time, to determine whether the requisite good cause has been shown." *Id.*

This Board has routinely denied requests to extend time where the moving party has not set forth, with specificity, the reasons why it could not prepare and submit a response in the time allowed by the rules. *See, e.g., Procyon Pharmaceuticals Inc. v. Procyon Biopharma Inc.*, 61 U.S.P.Q.2d 1542, 1543-44 (TTAB 2001) (petitioner failed to explain how activity of rearranging its laboratory facilities during relevant time period prevented taking testimony; no detailed information regarding petitioner's apparent difficulty in preparing and submitting its evidence or why petitioner waited until the last day of its testimony period to request the extension); *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 U.S.P.Q.2d 1848, 1851 (TTAB 2000) (applicant's motion to extend discovery denied when counsel knew of unavailability of witness a month before, yet delayed until last day to seek an agreement on an extension of time; while maternity leave may constitute good cause, defendant's counsel knew that defendant would not be able to comply with deadline, yet waited until penultimate day of response period to file unconsented motion to extend time); *Fairline Boats plc v. New*

Howmar Boats Corp., 59 U.S.P.Q.2d 1479, 1480 (TTAB 2000) (motion denied where party failed to provide detailed information regarding apparent difficulty in identifying and scheduling its witnesses for testimony and where sparse motion, containing vague reference to possibility of settlement, demonstrated no expectation that proceedings would not move forward during any such negotiations).

Rapid Rack's request for an extension of time is equally bereft of any reason why Rapid Rack could not prepare a response in a timely fashion. Indeed, the reason provided by Rapid Rack—its decision to prepare and file a complaint in California—belies its assertion of the need for an extension of time. If Rapid Rack had time to draft a complaint, it had time to respond to the First Motion for Sanctions, which has now been pending before the Board since September 5, 2008. Having to respond to a very serious Motion for Sanctions notwithstanding the fact that it has filed a complaint in another forum does not constitute a hardship for which Rapid Rack is entitled to an extension. Stated simply, Rapid Rack's desire to delay complying with its discovery obligations and answering for its discovery failures do not constitute good cause to extend the time for Rapid Rack to finally respond regarding for its discovery-related misconduct.

II. RAPID RACK'S MOTION FOR AN EXTENSION OF TIME MISCHARACTERIZES RAPID RACK'S DEADLINE TO RESPOND, WHICH HAS NOW EXPIRED.

In its motion for extension of time, Rapid Rack includes a footnote in which it states the following: "Rapid Rack's current response to the Amended Motion to Compel tolls from the time of filing the Amended Motion and therefore a response is not due until October 7, 2008 under 37 C.F.R. §§ 2.119(e), 2.127(a)." The time for Rapid Rack to respond to the First Motion for Sanctions was not tolled by the filing of the amended version, which essentially

was requested by Rapid Rack's counsel and which made *absolutely no* substantive changes (only some redactions to account for Rapid Rack's erroneous assertions that the filing contained confidential information). Further, Rapid Rack's filing of the Motion for Extension of Time did not toll its response deadline. Rapid Rack's failure to respond by the September 25, 2008 deadline should result in (a) Rapid Rack's Motion for an Extension of Time being denied, and (b) the First Motion for Sanctions being granted without Response from Rapid Rack.

The "tolling" argument by Rapid Rack mischaracterizes the nature of the Amended Motion and the reason for which it was filed. The Amended Filing was made, based on instructions provided by the Interlocutory Attorney, in response to objections by Rapid Rack's counsel. Rapid Rack's counsel had objected on the grounds that the original filing did not redact information designated as confidential (although it now appears that the confidential designations were improperly made by Rapid Rack).[1] The Amended Motion is *identical* in substance to the original Motion to Compel, and it differs from the original only in that the allegedly confidential information is redacted and in that there is an introductory notation stating the reason why it was filed. The Interlocutory Attorney instructed the undersigned counsel that the Amended Filing would have no impact on the deadline for Rapid Rack to respond, and the undersigned counsel brought this information to the attention of Rapid Rack's counsel.[2] A few days later, counsel for Rapid Rack candidly acknowledged that "Rapid Rack's response to [Petitioner's] Motion to Compel [the First Motion for Sanctions] is due . . . [on]

[1] *See* Correspondence concerning confidentiality designations, attached as Exhibit 5 to the Brief in Support of the Second Motion for Sanctions (Doc. No. 15).
[2] *See id.*

September 22, 2008,"[3] and Rapid Rack's counsel even used the response deadline as a reason for postponing Rapid Rack's Rule 30(b)(6) deposition.[4] Thus, Rapid Rack was fully aware of its the response was due within twenty days of the filing of the First Motion for Sanctions on September 5, Rapid Rack failed to timely respond to the First Motion for Sanctions when it was required to do so on September 25, 2008.

Further, the two referenced provisions of the Code of Federal Regulations do not even remotely stand for the proposition for which they have been cited by Rapid Rack. Trademark Rule 2.119(e) states:

> Every paper filed in an *inter partes* proceeding, and every request for an extension of time to file an opposition, must be signed by the party filing it, or by the party's attorney or other authorized representative, but an unsigned paper will not be refused consideration if a signed copy is submitted to the Patent and Trademark Office within the time limit set in the notification of this defect by the Office.

37 C.F.R. § 2.119(e). There have not been any unsigned papers filed with the Board, and, in any event, this Rule has nothing to do with the deadline to respond to a motion. Accordingly, Trademark Rule 2.119(e) did not "toll" the time for Rapid Rack to respond to the First Motion for Sanctions, the deadline for which was September 25, 2008 (twenty days after the motion was filed).

Trademark Rule 2.127(a) states in its entirety:

> Every motion must be submitted in written form and must meet the requirements prescribed in § 2.126. It shall contain a full statement of the grounds, and shall embody or be accompanied by a brief. Except as provided in paragraph (e)(1) of this section [dealing with summary judgment], **a brief in response to a**

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[3] *See* email correspondence between Joseph Dowdy and Patrick Orme, attached as Exhibit 2 to the Brief in Support of the Second Motion for Sanctions (Doc. No. 15). The error appears in the original. It should read "September 25, 2008."

[4] *See id.*

> **motion shall be filed within fifteen days from the date of service of the motion unless another time is specified by the Trademark Trial and Appeal Board, or the time is extended by stipulation of the parties approved by the Board, or upon motion granted by the Board, or upon order of the Board.** If a motion for an extension is denied, the time for responding to the motion remains as specified under this section, unless otherwise ordered. The Board may, in its discretion, consider a reply brief. Except as provided in paragraph (e)(1) of this section, a reply brief, if filed, shall be filed within fifteen days from the date of service of the brief in response to the motion. The time for filing a reply brief will not be extended. No further papers in support of or in opposition to a motion will be considered by the Board. The brief in support of a motion and the brief in response to the motion shall not exceed twenty-five pages in length, and a reply brief shall not exceed ten pages in length. Exhibits submitted in support of or in opposition to a motion shall not be deemed to be part of the brief for purposes of determining the length of the brief. **When a party fails to file a brief in response to a motion, the Board may treat the motion as conceded. An oral hearing will not be held on a motion except on order by the Board.**

37 C.F.R. § 2.127(a). This rule also does not provide for the tolling of the September 25 deadline for Rapid Rack to respond to the first motion for sanctions. If anything, it makes clear that, absent a contrary ruling from the Board, Rapid Rack was required to respond within the time provided by the Rule.

As the last provision of Trademark Rule 2.127(a) notes, the failure of a party to file a response brief may result in the Beard deeming the motion conceded. Rapid Rack knew or should have known that its time to respond was not tolled by the filing of the redacted motion, but it nonetheless failed to respond on or before the September 25 deadline. As a result, Rapid Rack is out of time. Its Motion for an Extension of Time should be denied out of hand, and the Board should proceed to rule on Petitioner's First Motion for Sanctions.

II. EVEN IF RAPID RACK'S TIME TO RESPOND TO THE FIRST MOTION FOR SANCTIONS IS CALCULATED FROM THE FILING OF THE AMENDED MOTION, THEN RAPID RACK MUST RESPOND, AT THE LATEST, ON OCTOBER 7, 2008.

The proper course of action would have been for Rapid Rack to respond within the twenty-day response window following the service of the First Motion for Sanctions on September 5, 2008. However, even assuming *arguendo* that Rapid Rack could delay consideration of the First Motion for Sanctions (by making spurious assertions that truly confidential information had been filed and by forcing an amended filing with redactions), then its response would be due, at the latest, twenty days from service of the amended First Motion for Sanctions on September 17, 2008. That twenty-day deadline (if applicable) expires today, October 7, 2008.

Absent an order from the Board, a response brief "**shall** be filed" within the time established by the Rules. 37 C.F.R. 2.127(a). "If a motion to extend the time for taking action is denied, the time for taking such action may remain as previously set." TBMP § 509.01(a). Accordingly, even if one accepts Raid Rack's calculation of the response deadline, it now must finally respond and explain its discovery failures. If Rapid Rack fails to do so, the Board should treat the first Motion for Sanctions as uncontested and grant Petitioner the relief requested therein (including judgment as a sanction).

CONCLUSION

There simply is no good cause to delay Rapid Rack's Response to the First Motion for Sanctions and to allow Rapid Rack a "get out of jail free" card for its discovery-related misconduct in this proceeding before the Board merely because it has recently filed another lawsuit. The Board should deny Rapid Rack's Motion for an Extension of Time and should proceed to rule on Petitioner's First Motion for Sanctions.

Respectfully submitted, this 7th day of October, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this day a true and correct copy of the foregoing document has been served this day by depositing a true copy thereof in a depository under the exclusive care and custody of the United States Postal Service in a first class postage prepaid envelope and properly addressed as follows:

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This, the 7th day of October, 2008.

NELSON MULLINS RILEY & SCARBOROUGH, L.L.P.

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